No. 84-145

In The

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE KRIEGER,

Petitioner,

-vs-

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Does the factual finding that there existed adequate, independent evidence to corroborate the petitioner's confessions, so as to permit admission into evidence of those confessions under a standard which is substantially identical to that adopted by this Court and the overwhelming majority of state courts, warrant the grant of a petition for certiorari?

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OPINIONS BELOW

The opinion of the New Jersey Supreme Court (Pa 1)* is reported in *96 N.J. 256 (1984).* The opinion of the Superior Court of the State of New Jersey, Appellate Division (Pa 4), is reported at *193 N.J. Super. 568 (App. Div. 1983).*

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the petition.

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*Pa refers to the petitioner's appendix.
T refers to the transcript of proceedings on February 17, 1981.
2T refers to the transcript of proceedings on February 18, 1981.
3T refers to the transcript of proceedings on February 19, 1981.
4T refers to the transcript of proceedings on February 20, 1981.
ST refers to the transcript of proceedings on March 24, 1981.

COUNTER-STATEMENT OF THE CASE

At approximately 7:00 a.m., on January 29, 1980, plant manager Harold Naiman arrived at the Sealy Mattress Company, which employed seventy workers in its facility at 85 Goshen Street, Paterson, New Jersey. (2T71-18 to 20; 2T72-1 to 2; 2T72-10 to 12; 2T81-4 to 8). Pursuant to his work routine, Mr. Naiman conferred with his foreman regarding factory operations. (2T72-14 to 16). At approximately 7:20 a.m., an announcement was made over the loudspeaker system that there was a fire on the second floor of the three-story facility. (2T89-19 to 2T90-4; 2T72-17 to 19). Upon hearing this report, the two men ran up to the second floor of the plant. (2T72-19 to 20). This area, primarily used to store the cortex insulating pads utilized in mattress manufacture, was approximately forty by one hundred feet and U-shaped. (2T82-15 to 17); some assembling of mattresses was conducted on the east end of the floor. (2T73-14 to 16).

When Mr. Naiman reached the second floor area, he observed that it was the cortex pad materials which were burning (2T73-19 to 24), fifty of which constituted one bale of cortex. These cortex bales were stacked against the wall, with the "hottest" part of the fire appearing to be approximately ten feet from the wall. (2T86-2 to 5; 2T73-21 to 22). Naiman saw that the bulk of the fire was in the "whole middle [area]." (2T90-22 to 23). At this time, Sealy employees were attempting to put out the fire with extinguishers. (2T72-21 to 22; 2T86-15 to 17). Shortly thereafter, the sprinkler system was activated, and the Paterson Fire Department responded to the concurrent alarm at approximately 8:06 a.m. (2T102-10 to 24).

In the course of extinguishing the fire, the fire department directed the removal of the approximately thirty bales of cortex stored in the area to the factory yard (2T74-18 to 22); if any sign of combustion was evident, the firemen then broke open the bales and wet them thoroughly. (2T74-22 to 23). No structural damage to the building's floor or walls resulted from the fire, although there was some water damage from seepage to the sewing floor below, and to the mattress covers and border materials. (2T74-5 to 7; 2T75-2 to 7). Approximately eight bales were partially or completely destroyed by fire. (2T85-22 to 2T86-7). As a result of the clean-up required because of the fire, mattress production did not resume until the following day. (2T75-9 to 10).

The plant premises were examined by Paterson Fire Investigator Chief William Shortway on the date of this fire. (2T99-7 to 8; 2T99-19 to 21). Chief Shortway, who at the time of the fire had approximately seventeen years experience in fire-fighting, confirmed that the fire had originated on the second floor and that it had effected no damage to the building's structure. (2T100-8 to 12). Chief Shortway also determined that the items involved in the fire and removed to the yard area were bales of fiber used in mattress construction. (2T100-13 to 15).

In addition, Chief Shortway performed a number of tests regarding the combustibility of materials taken from bales identical to those burned in the fire. (2T100-19 to 23). First, he attempted to ignite the bales with a lit cigarette. (2T100-24 to 2T101-3). The bale failed to ignite, and the cigarette went out. (2T101-4 to 6). Thereafter, Chief Shortway tried to ignite the bale material with a match and it did catch on fire. (2T101-7 to 11). These tests were first conducted at the factory; a second series of tests was done at fire headquarters. (2T101-12 to 14). Although Chief Shortway was unable to identify a specific cause of the fire, on the basis of his examination of the premises, he concluded that it was not caused by any heating or wiring system in the building itself because there were no ignition sources of that type in the area of the fire. (2T101-25 to 2T102-1). Chief Shortway testified that the fire was intentional and "done by human hand." (2T102-2 to 6). Furthermore, although no burned matches or any other source of ignition were found, Chief Shortway noted the remote liklihood of a match being recovered due to the extensive clean-up operation effected by the Paterson Fire Department, which included "squeegeeing" the storage room floor and otherwise removing water and burned materials. (2T105-1 to 14).

Two weeks later, on February 12, 1980, the Sealy Mattress Company plant was the site of a second arson which was reported by alarm to the Paterson Fire Department at approximately 7:03 a.m. (2T77-7 to 20; 2T110-12 to 13). Upon arriving at the factory that morning shortly after 7:00 a.m., Mr. Naiman observed Paterson firemen and their equipment on the premises. (2T77-14 to 17). This second fire also originated on the second floor (2T77-17 to 18), and the burning materials were the flat packs of hog and horse hair pads used to construct mattresses. (2T77-21 to 2T78-1). This fire was quite smokey, and there was a distinct rancid odor due to the animal hair. (2T78-12 to 14).

In containing the fire, the Fire Department removed the hair pads from the factory to the outside.(See 2T78-15 to 20). Again, although there was no structural damage effected by the fire itself, the weight of the water used to extinguish the blaze caused the floor to buckle. (2T78-21 to 2T79-2). Fifteen bundles, or three bales of hair pads, were either partially or completely burned in the fire. (2T90-10 to 19).

On the date of this second arson, Captain Vittorio Diddio, employed by the Fire Department for approximately nineteen years at the time of the fire, was assigned to the Bureau of Combustibles as a fire investigator; he examined the three-story Sealy Mattress factory. (2T106-1 to 16). Pursuant to his investigation, Captain Diddio did not find any structural damage to the building itself. (2T106-20 to 25). He did observe that bales of mattress stuffing had been moved from the second floor to outside the building, where they were wet down by the firemen. (2T107-8 to 10). Captain Diddio then took a sample of the material from the hair bales and performed two tests to determine its combustibility. (2T107-20 to 21).

Placing the material in an ashtray, Captain Diddio first attempted to ignite the material with a lit cigarette. (2T107-21). When Captain Diddio used a cigarette, the material smoldered, and, in his opinion, might possibly have sustained a fire under certain conditions. (2T107-24 to 25; 2T109-10 to 12). However, when he exposed the material to an open flame, it immediately burst into flame and burned quite rapidly. (2T108-2 to 3). Based upon his investigation, Captain Diddio determined that the fire was intentionally set. (2T108-8 to 9). Although no match or cigarette was recovered by Captain Diddio, in the course of containing the fire, the bale materials had been brought outside by the firemen, and the area cleared. (2T109-21 to 2T110-1).

On February 14, 1980, Investigator Arthur Hyslop and Investigator Robert Daniels, members of the Arson Unit of the Passaic County Prosecutor's Office, spoke with plant employees concerning the two arsons. (3T77-6 to 8). The petitioner, who had been employed there since January 2, 1980, was among those interviewed (2T76-12 to 15); the petitioner's work duties were to check schedules and to correlate the box spring covers with the daily schedules by examining production loads and making notations on a pre-determined list when these materials were before him. (2T80-11 to 25). When completed orders of box spring covers were available, the petitioner was responsible for transporting them to the second floor by elevator and distributing the covers to the box spring department. (2T80-15 to 17).

The petitioner was not one of the three Sealy employees regularly working in the storage area; however, his employment duties routinely and frequently took him there. (2T83-8 to 16). After his correlation of the box spring covers with the production schedule, the petitioner was required to bring the covers to the second floor via the elevator or a stairway affording access to the first floor sewing room. (2T8-8 to 12; 2T84-16 to 23).

When the officers met with petitioner at the plant on February 14, 1980, Investigator Daniels told him that they were conducting an investigation of the two arsons at the company. (2T75-25 to 3T76-2). Investigator Daniels also read him his *Miranda* rights. (3T75-17 to 3T76-17). Thereafter, Investigator Daniels questioned the petitioner about the arsons. (3T76-23 to 24). The petitioner denied any knowledge of the fires other than that he had assisted in extinguishing them. (3T77-2 to 4). Investigator Daniels then asked petitioner if he would be willing to take a polygraph test. (3T77-9 to 10). The petitioner consented, and the examination was scheduled for February 25, 1980. (2T77-10 to 11).

As agreed upon, petitioner reported to the Prosecutor's Office on February 25, 1980. (3T77-10 to 14). At that time, Investigator Hyslop introduced petitioner to Investigator Richard Falcone, the certified polygraph examiner. (3T77-19 to 24; 3T3-12 to 13). The petitioner signed the log book and Investigator Falcone gave him an informational booklet regarding the polygraph instrument and the procedures employed. (3T4-11 to 16). Investigator Falcone advised the petitioner to take as much time as necessary to review the booklet and to ask him any questions he might have concerning the test. (3T5-8 to 11). Investigator Falcone then left the petitioner alone to read the materials, returning in approximately ten minutes. (3T77-17 to 24). Thereafter, the officer escorted defendant to the polygraph suite. (3T6-3 to 4).

Prior to proceeding further, Investigator Falcone advised petitioner that he was under no obligation to undergo the test, and should he choose to do so, petitioner was free to leave at any time. (3T6-16 to 10). The petitioner was told that he had a right to have a lawyer present prior to any questioning or polygraph examination; should he be unable to afford counsel, an attorney would be appointed to represent him. (3T6-14 to 19). Investigator Falcone explained that petitioner did not have to answer any questions posed to him; he also said to petitioner that even should he begin to answer questions, the petitioner could elect to stop answering any of the questions at any

time during the interview. (3T6-22 to 25). Finally, Investigator Falcone told petitioner that anything he did say could be used against him in court. (3T7-1 to 3).

After this explanation of his rights, petitioner executed a form acknowledging that he understood his constitutional rights and granting permission to administer the polygraph examination. (3T7-6 to 8; 3T10-16 to 3T11-4). Investigator Falcone then told the petitioner how the polygraph examination was going to be conducted. (3T11-25 to 3T12-4).

Pursuant thereto, Investigator Falcone asked petitioner to demonstrate various physical responses. (3T12-1 to 3T17). Investigator Falcone also took preliminary background information from the petitioner. (3T14-18 to 21). Investigator Falcone then checked the polygraph for accuracy by plotting a norm for petitioner's responses to three questions; he found the instrument to be operating properly. (3T15-7 to 3T17-10). Investigator Falcone also advised petitioner that the polygraph instrument could determine whether or not an individual lied, but not his or her reason for doing so. (3T17-20 to 3T18-14). Finally, Investigator Falcone advised petitioner that if he intended to lie, he should reconsider going through with the test, inasmuch as the results would indicate whether or not he was truthful in his answers. (3T18-15 to 19).

The investigator then began to discuss the arsons and petitioner's employment at the plant. (3T18-20 to 25). Petitioner initially denied any knowledge of the fires except that he had tried to assist in extinguishing them. (3T18-22 to 25). Thereafter, petitioner stated that he might have inadvertently started the fire by possibly dropping a cigarette in the plant's storeroom. (3T19-1 to 12). Investigator Falcone conferred with Investigator Hyslop (3T19-14 to 18); afterwards, he returned to the room and told defendant that it was highly unlikely that the fire could have been started by his having dropped a cigarette. (3T20-4 to 6).

The petitioner then told Investigator Falcone that he had been playing with matches and that he wanted to see if the material would ignite. (3T20-9 to 10). Upon further questioning, the petitioner admitted that he had intentionally set the fire on January 29, 1980, by holding lighted matches against mattress materials. (3T20-11 to 14). The petitioner cited a need to receive recognition from his employer and from his family as his motive for the arson. (3T20-16 to 2T21-2).

The petitioner subsequently admitted setting the factory fire of February 12, 1980; he said the second fire was started by his placing a cigarette inside a book of matches which he had positioned near flammable material. (3T21-12 to 20). Petitioner stated that he again assisted in putting out the fire, which he had started in order to gain recognition from his employers and family (in particular, his father, who was a Newark fireman). (3T21-20 to 3T22-13). The petitioner also told Investigator Falcone that he was on the list for appointment as a Newark fireman. (3T22-7 to 8).

Investigator Falcone then asked petitioner to write down what he had told him. (3T22-13 to 15). The petitioner indicated he would include in his statement that he "was sorry for what he had done and would never do anything like it again." (3T23-15 to 18). Investigator Falcone requested that petitioner complete a brief paragraph setting forth what he had said, and if he were sorry, to so indicate that on the paper. (3T22-19 to 22). The petitioner complied and provided the following statement:

> Lawrence Krieger 12:36 p.m.
> 61 Brill St. Newark February 25, 1980
>
> I'm really sorry for what happen (sic) at Sealy Mattress Company. Im (sic) the one who set the fires on Jan. 29 and Feb. 12. I will never do anything like this again, I never did anything like this before and Im (sic) ashamed. Everything I have written and said is 100% truth. Im (sic) sorry.
>
> [signed] Lawrence Krieger

(3T24-7 to 23).

Investigator Falcone then asked the petitioner to indicate whether or not what he had written was the truth and if any complaints, promises or threats had been made against him. (3T25-5 to 15). The petitioner then added a second paragraph in which he said the statement had been given voluntarily:

> I have read the above and it is all the truth. No one have (sic) forced me to write this, or made any promises to me. I was treated very fairly by Richard Falcone. I have no complaints about what has happen (sic) hear (sic) today.
>
> [signed] Lawrence Krieger
> 12:46 p.m.

(3T24-7 to 23).

Thereafter, Investigator Falcone brought the petitioner downstairs to meet with Investigator Hyslop. (3T26-11 to 12). Prior to questioning the petitioner, and in the presence of Investigator Falcone, Investigator Hyslop advised the petitioner of his rights. (3T26-12 to 13); Investigator Hyslop then questioned him about the factory fires. (3T26-14 to 15). The petitioner was asked whether he would give a formal typewritten statement concerning his responses, and he agreed to do so. (3T26-17 to 19).

Before the petitioner's statement was taken, petitioner was again advised of his rights, and he again executed a waiver form. (3T26-19 to 22). Thereafter, he gave a formal statement to police. (3T27-12 to 13). This confession was taken in question-and-answer form, and the relevant inculpatory portion is set forth below:

> Q. Knowing and understanding your rights, and knowing you are not under arrest or custody, do you wish to give us a statement about a fire which occurred on January 29, 1980 and a fire that occurred on February 12, 1980?
>
> A. Yes.
>
> Q. Can you tell me in your own words the circumstances leading up to the fire which occurred on January 29, 1980?
>
> A. Well I was under pressure (sic) a lot of problems and I was constantly told I was irresponsible. I punched in. I went into the sewing room to see if anything had to brought up stairs (sic). There wasn't anything at the time. So I walked up stairs (sic) went into the store room and I had a cigarette and I was playing with a book of matches. I dropped them on the floor (sic) then the fire started. And I grabbed the fire extinguisher to put it out. No harm intended. Then other people grabbed fire extinguishers until the fire dept. arrived, then I went downstairs to help cover the machines and the materials so they wouldn't be damaged. Then we cleaned up and work went on as usual.
>
> Q. What kind of pressure are you under?
>
> A. Many family problems, non-understanding of the things I do, (sic) lack of my ability and responsibility.

Q. On January 29, 1980, what time did you punch in to work?

A. About five to seven. (a.m.)

Q. How soon after punching in did you go to the store room?

A. Twenty minutes.

Q. Approximately what time did you set the fire?

A. 7:30 a.m.

Q. You stated previously, that you were playing with a book of matches. Why?

A. I dropped them on the floor to start the paper on fire to burn the matts (sic).

Q. In what part of the store room did you set the fire?

A. The middle.

Q. Did you know before you got to work that you were going to start a fire?

A. Not really. It was on my mind.

Q. When did you first plan to start the fire and why?

A. The day before it happened, did it for recognition and a form of responsibility cause I put the fire out before it spread to any great deal of damage. No harm was intended.

Q. Do you want a cup of coffee or something to drink at this time or go to the men's room.

A. Just a cigarette. (At this time, Inv. Hyslop gave him a cigarette).

Q. When you planned the fire, did you also plan to put it out?

A. Yes, immediately.

Q. Previously, you stated that you wanted to receive recognition. Why?

A. I felt as if no body (sic) knew I was there. And I was just running around doing things that no one really appreciated.

Q. From whom do you want to get this recognition?

A. Any superior.

Q. Did you feel by starting the fire and subsequently extinguishing the fire that you would gain this recognition?

A. I don't know but I was hoping to.

Q. At this time would you like to add anything else regarding the fire on January 29, 1980?

A. Only that there was absolutely no harm to any one or anything except the mats.

Q. Again can you tell me in your own words the circumstances which were involved regarding the fire at Sealy Mattress Co. on February 12, 1980?

A. I punched in. I went to the sewing room to see if anything was to be brought upstairs. I brought a cart of materials up on the elevator. I talked to Wyatt. I proceeded to walk down stairs (sic). Still with family problems, and work problems regarding my responsibility I lit a cigarette, put a book of matches on an inside ledge, placing the cigarette down on the same ledge, (sic) I walked to the third floor. I thought I heard someone coming from upstairs. I spoke to Willie and came immediately down stairs (sic) to extinguish the fire. Again with no harm intended.

Q. Why did you start this second fire on February 12, 1980?

A. Hoping for possible recognition of the company and home.

Q. At approximately what time did you set this fire?

A. About 8:00 a.m.

Q. In what room did you place the cigarette and matches on the ledge?

A. It was in the store room where the mats are kept.

Q. Did anyone besides yourself have anything to do with setting the fire on January 29, 1980 or February 12, 1980?

A. No.

Q. Did you discuss this with anyone before you set the fires?

A. No.

Q. When did you start working at Sealy Mattress Co.?

A. January, I don't know if it was the second or third. I think it was the second, 1980.

Q. Did you ever set any other fires either at Sealy Mattress Co., or anywhere else?

A. Never.

Q. On February 12, 1980 did you know before you got to work that you were going to start a fire?

A. Yes.

Q. When did you first plan to start the fire?

A. The night before and that morning. Again, with no harm intended.

Q. Previously in your statement, you state that you spoke to Willie. Who is Willie?

A. He's in charge of foam rubber at Sealy.

Q. Why did you put a lit cigarette and a book of matches on the ledge in the store room?

A. To start a small fire.

Q. How would this start the fire?

A. The cigarette would start the book of matches on fire, causing a bundle of mats to catch.

Q. Is there anything that you would like to add regarding the fire on February 12, 1980?

A. I just want it to be understood that there was no harm intended or a great deal of damages to occur. (3T88-14 to 3T94-11).

On April 1, 1980, the petitioner was charged in Passaic County Indictment No. 397-80 with two counts of third degree arson, in violation of *N.J.S.A. 2C:17-1(b) (1 and 2)*. (Pa 26 to Pa 27). The petitioner was tried before the Honorable Herbert S. Alterman, J.S.C., and a jury between February 17, 1981 and February 20, 1981. (Pa 35).

The petitioner's confessions were held admissible after a *Miranda* hearing before Judge Alterman on June 17, 1981. (T4-17 to 18; T11-4). After reviewing the testimony given by Investigator Hyslop, Investigator Falcone and the petitioner, together with the arguments of counsel, the court was satisfied beyond a reasonable doubt that the statements of petitioner were given voluntarily; accordingly, they were admissible at trial. (2T25-6 to 14).

With respect to the defendant's confession, details concerning the petitioner's presence in the factory on the dates and at the times of the arson (2T79-24 to 25; 2T80-1 to 2; 2T99-22 to 25; 2T106-8 to 11), where he set each fire (2T86-1 to 5; 2T90-22 to 23), the manner of their ignition (2T101-7 to 11; 2T108-2 to 3), a general description of the materials burned (2T100-13 to 15; 2T78-8 to 12; 2T107-1 to 7) and the very fact that the fires were arson (2T102-2 to 6; 2T108-4 to 9) were corroborated by the State's proofs at trial. Furthermore, the petitioner's statements regarding the efforts made to extinguish the fires (2T74-15 to 24; 2T78-15 to 16), the subsequent clean-up on each occasion (2T75-11 to 24; 2T96-11 to 13), the absence of structural damage to the building after each fire (2T74-8 to 14; 2T78-21 to 2T79-2) and a possible motive for setting the fires (2T81-17 to 22; 2T94-7 to 21) were supported by trial testimony.

At the conclusion of the State's case, defense counsel moved for a judgment of acquittal on the basis that the petitioner's confessions were not corroborated by the evidence adduced at trial. (3T124-1 to 20). In denying the defendant's application, the court found that there was sufficient corroboration of the confessions and that evidence had been presented which, if believed, would support a finding of guilt by the jury. (See 3T128-23 to 3T129-19).

On February 20, 1981, the jury returned a verdict of guilty on both counts of the indictment. (See Pa 35). On March 24, 1981, the petitioner appeared before Judge Alterman for sentencing. (Pa 35). The court imposed concurrent, indeterminate terms at the Yardville Youth Correction Center on the two counts. (Pa 36). With respect to Count

II, the court also directed the petitioner to pay a $25 penalty to the Violent Crimes Compensation Board. (Pa 36). On the same date, Judge Alterman granted the petitioner's application for bail pending appeal.

The petitioner filed his Notice of Appeal to the Superior Court of New Jersey, Appellate Division, on March 24, 1981. (Pa 28 to Pa 29). The matter was argued before the Appellate Division on January 4, 1983. (Pa 4). In its majority opinion, that court reversed the petitioner's conviction on the ground of the inadequate independent corroboration of the petitioner's conviction, which issue (Pa 5) it raised *sua sponte*. The case was then remanded for entry of a judgment of acquittal. Presiding Judge Herman D. Michels filed a dissenting opinion on the above issue, expressly finding that "the State's proofs were sufficiently corroborative to present a question for the jury as to the trustworthiness of defendant's confession." (Pa 20 to 21).

The respondent's Notice of Appeal to the Supreme Court of New Jersey was docketed on April 11, 1983. (Pa 28 to Pa 29). On May 16, 1984, in a 4-3 ruling, the New Jersey Supreme Court reversed the decision of the Appellate Division and reinstated the conviction for the reasons set forth in the dissenting opinion of the Appellate Division. (Pa 1 to Pa 2). The three dissenting justices noted that they would have affirmed for the reasons expressed in the Appellate Division majority opinion. (Pa 3).

On July 16, 1984, the petitioner filed his petition for a writ of certiorari; he remains on bail pending review of his application by this Court.

SUMMARY OF ARGUMENT

The standard utilized by the New Jersey Supreme Court in its determination that the petitioner's voluntary confessions were sufficiently corroborated by the evidence adduced at trial is completely consistent with the rulings of this Court and the overwhelming weight of state court decisions on the requisite corroboration of extrajudicial statements.

ARGUMENT

The corroboration of confession rule enunciated by the New Jersey Supreme Court in *State v. Lucas, 30 N.J. 37, 152 A. 2d 50 (1959)* and applied in the present case fully comports with federal and state constitutionally guaranteed rights to due process of law. The petitioner's assertion that state and federal courts have a "compelling" need for guidance regarding the type and quantum of independent corroboration required to substantiate a confession ignores settled federal and state law of long precedence. The instant matter cannot legitimately be characterized as a federal question invoking review because the New Jersey standard regarding the adequate independent evidence which will warrant consideration by the fact-finder of a defendant's voluntary confession is in complete accord with the mandates of this Court. In asserting a variance between the pronouncements of this Court on the corroboration of extrajudicial statements and the reinstatement of the petitioner's conviction by the New Jersey Supreme Court, the petitioner weaves a fiction which is disclosed by reference to the relevant decisions of both Courts.

In *Smith v. United States, 348 U.S. 147 (1954)*, this Court spoke directly to the issue of the requisite corroboration for a confession, stating:

> It is agreed that corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty.

Id. at 156.

With respect to the character or quantum of evidence necessary, this Court in *Smith* observed. "All elements of the offense must be established by independent evidence of corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statement of the accused." *Id.*

In *Opper v. United States, 348 U.S. 84 (1954)*, which affirmed a conviction on a charge of inducing a federal employee to accept additional compensation, this Court had occasion to discuss the requirement of corroboration of an extrajudicial statement, holding:

> .....the corroborative evidence need not be sufficient, independent of the statements to establish the corpus delecti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith v. United States, No. 52* this term. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.

Id. at 93.

Evaluated in light of the above formulations, the pronouncements of the New Jersey Supreme Court in *State v. Lucas, supra,* that "the State must introduce independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness, plus independent proof of loss or injury...." follows in letter and spirit the directives of this Court. *Id.* at 56, 152 A. 2d at 60.

The character of corroborating evidence was also examined by the *Lucas* Court, which quoted with approval the analysis given in a very early New Jersey case, *State v. Guild, 10 N.J.L. 163, 187, 18 Am. Dec. 404 (Sup. Ct. 1828):*

> In the first place, however, it becomes material to a correct understanding of the subject to settle what is meant by the qualification 'corroborating' annexed to the term 'circumstances.' The phrase clearly does not mean facts which independent of the confession will warrant a conviction, for then the verdict would stand not on the confession, but upon those independent circumstances. To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated, when it is shown to correspond with the representation of some other witness or to comport

> with some facts otherwise known or established. Corroborating circumstances then, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such in short as may serve to impress a jury with a belief of its truth.

30 N.J. at 54-55, 152 A. 2d at 59. See *Brown v. State, 154 N.E. 2d 720 (Ind. 1959).*

Review of the cited standards unambiguously disproves the petitioner's contention that in reinstating his conviction, the New Jersey Supreme Court has deviated from the test for corroborating evidence approved by this Court. Furthermore, comparison of the holdings in both decisions show that regardless of nomenclature *i.e.*, "any legal evidence" versus "substantial independent evidence" the rulings by this Court on the issue were meticulously observed by the New Jersey Supreme Court.

Similarly, the petitioner's contention that state and federal courts are in dire need of direction in this area is patently frivolous. The decisional law of other jurisdictions shows New Jersey not to be unique in limiting the burden which must be satisfied by corroborating evidence. See *e.g., Armstrong v. State, 502 P.2d 440 (Alaska 1972)* (corroborative evidence need not be sufficient to sustain conviction independent of defendant's statement); *Nelson v. State, 123 A. 2d 859 (Del. 1956)* (to establish that a crime has been committed, a quantum of proof aliunde the confession, though not in itself conclusive, must prove the crime beyond a reasonable doubt when reviewed in conjunction with the confession).

The following states also recognize that corroborating evidence need not be of such a character as to independently establish the defendant's guilt. See *Frazier v. State, 107 So. 2d 16 (Fla. 1958)* (before a confession is admitted into evidence, there must be some independent proof, either direct or circumstantial, tending to show a crime has been committed); *Jefferies v. State, 92 Ga.App. 483, 88 S.E. 2d 713 (1955)* (a confession by a criminal defendant must be supported by independent evidence tending to establish the guilt of the accused); *State v. Hale, 367 P.2d 81 (Hawaii 1961)* (with reference to a corroborated confession, full proof of the corpus delecti is not required); *People v. Pry, 75 Ill. App. 2d 103, 220 N.E. 2d 238 (3d App. Ct. 1966), aff'd 38 Ill. 2d 261, 230 N.E. 2d 825 (1967)* (direct and positive evidence is unnecessary to prove corpus delecti; it is

sufficient if other evidence so corroborates a confession as to show commission of the crime beyond a reasonable doubt); *Jones v. State, 252 N.E. 2d 572 (Ind.1969)* (elements of crime may be shown by use of confession in connection with any independent evidence in proving the case - material/substance on which crime has been committed, plus independent evidence from which an inference may be drawn that crime was committed in connection thereto are sufficient to show corpus delecti).

The minimal threshold requirements regarding corroboration which will permit a jury to pass upon a confession together with all other evidence in the case were also treated in the following decisions. *Sefton v. State, 295 P. 2d 385 (Nev. 1956)* (proof of corpus delecti is not required to be as full and conclusive where there is corroborating confession); *State v. Pickard, 177 A.2d 401 (N.H. 1962)* (supporting evidence need not be considered independently of an extrajudicial confession in order to establish the corpus delecti); *People v. Rooks, 40 Misc. 2d 359, 243 N.Y.S. 2d 301,311 (Sup. Ct. 1963), aff'd 25 A.D. 2d 952, 271 N.Y.S. 2d 601 (1966), aff'd 18 N.Y. 2d 960, 277 N.Y.S. 2d. 417, 223 N.E. 2d 897 (1967)* (extensive discussion of independent evidence, exclusive of the confession, which is required to establish the corpus delecti); *State v. Thomas, 15 N.C.App. 289, 189 S.E. 2d 765, cert. den. 281 N.C. 763, 191 S.E. 2d 360 (1972)* (evidence other than defendant's confession must tend to establish the fact that the crime charged has been committed); *State v. Scarberry, 114 Ohio App. 85, 18 Ohio App. 2d 394, 180 N.E. 2d 631 (1961)* (presentation of some probative evidence aliunde the confession, tending to establish the corpus delecti, as a prerequisite to the admission of the confession; however, this evidence need not be beyond a reasonable doubt nor even present a prima facie case because it is sufficient if it tends to prove a material element of the offense); *Lankister v. State, 298 P.2d 1088 (Crim. Ct. App. Okla. 1956)* (extrajudicial confession will not sustain a conviction unless it is corroborated by independent evidence, either direct or circumstantial, relating to the corpus delecti).

Furthermore, expansive standards regarding the requisite corroboration of a defendant's confession were rejected in the following cases: *State v. Schleigh, 310 P.2d 341 (Ore. 1957)* (independent proof that crime charged was committed does not require that such proof be sufficient to warrant conviction, but the confession, taken with other proofs, must show beyond a reasonable doubt that crime was committed and that defendant committed it); *Commonwealth v. Byrd, 417*

A.2d 173 (Pa. 1980) (threshold requirement for independent evidence prior to admission of a confession "is not equivalent to the Commonwealth's ultimate burden of proof;" prosecution cannot preliminarily be required to prove the existence of a crime beyond a reasonable doubt inasmuch as rationale of corpus delecti rule is to prevent conviction where no crime has been committed); *State v. Cortellesso, 417 A.2d 299 (R.I. 1980)* (court, citing *State v. Jardine, 293 A.2d 901, 904 (R.I. 1972)*, noted it is not necessary to establish corpus delecti beyond a reasonable doubt before a confession can be received into evidence); *State v. Best, 232 N.W. 2d 447 (S.D. 1975)* (admissibility of extrajudicial confession is conditioned on its corroboration by other evidence showing the injury or loss, and the fact of some criminal responsibility for the injury or loss); *Smith v. State, 329 F.2d 498 (5th Cir. 1964)* (applying Texas law: confession may be used in connection with other facts and circumstances in establishing corpus delecti).

Respondent submits that the record below discloses ample corroboration of the defendant's confession and confirms that the New Jersey Supreme Court acted correctly in reinstating the conviction. However the petitioner couches his allegation of error, whether it be in terms of the sufficiency of corroborating evidence which happens to be circumstantial, or otherwise, respondent submits that to demand a standard of proof above what the petitioner herein describes as circumstantial is another way of requiring proof beyond a reasonable doubt before a confession will be admitted into evidence for consideration by the trier of fact. Notwithstanding the petitioner's dissatisfaction with the standard applied in this case, it clearly comports with the rule of law which has been approved by this Court and followed in the overwhelming majority of jurisdictions. To question the efficacy of this standard is equivalent to challenging, as petitioner does, the proposition that circumstantial evidence can support a finding of guilt beyond a reasonable doubt. Certainly, no decision by this Court has held that circumstantial evidence will not sustain a guilty verdict; in fact, this Court has ruled to the contrary. *Tot v. United States, 319 U.S. 463, 466-467 (1943).* Similarly, federal case law provides no basis from which to infer that circumstantial evidence will be deemed insufficient to corroborate a confession if it constitutes proof of petitioner's guilt beyond a reasonable doubt. See *Smith v. United States, supra at 157, 159.*

With reference to the arsons at the Sealy Mattress Company, the petitioner confessed to setting a fire in the building on January 29, 1980 (3T88-20 to 3T89-11); independent evidence through the testimony of Harold Naiman and Chief Shortway established that a fire had occurred at the premises on that date. (2T72-1 to 2; 2T72-10 to 12; 2T72-22 to 24; 2T102-10 to 14; 2T101-15 to 20; 2T101-21 to 2T102-2 to 6). The petitioner stated that he set the first fire at approximately 7:30 a.m. (3T89-23); an alarm signalling the fire at the Sealy factory was received by the Paterson Fire Department at 8:06 a.m. on January 29, 1980. (2T102-10 to 14). Moreover, the petitioner's presence at the factory on that date was confirmed by his employee time card which indicated that he had punched in at 6:58 a.m. (2T79-24 to 25).

Similarly, corroboration of the petitioner's statement that he set the first fire in the middle of the storeroom was provided by Harold Naiman's testimony regarding his observation of the second floor storage area, namely, that he saw the bulk of the fire in the "whole middle [area]." (2T90-22 to 23). The petitioner's description of the materials (mats) which he ignited was supported by the fact that cortex bales actually burned. (See 3T90-3 to 5; 2T85-19 to 2T86-7). In his confession the petitioner specified the second floor storeroom as the arson site (3T89-2 to 5); in fact, the fire broke out in that area. (2T72-17 to 19).

The petitioner also related that he had set the fire with a match (3T89-2 to 5); no natural cause was found to explain the fire on January 29, 1980. (2T102-2 to 6). The petitioner's admission that he had intentionally started the fire by means of a book of matches (3T89-4) was verified by the testimony of Chief Shortway, who said that the bales ignited when he attempted to light them with a match. (2T101-7 to 11). In addition, the petitioner's comment that "there was absolutely no harm to anyone or anything except the matts (sic)" comports with the plant manager's testimony that with the exception of smoke damage, property loss was limited to the cortex bales. (See 3T91-19 to 20; 2T74-5 to 14).

Respondent further notes that the petitioner's detailing of his activities prior to setting the fire on January 29, 1980 was entirely consistent with his prescribed work duties. (See 3T88-25 to 3T89-3; 2T80-11 to 17). Petitioner's statement that in setting the fire he felt

that he was not "appreciated" by his employer and "did it for recognition from any superior" (3T90-13 to 16) is also in accord with Mr. Naiman's testimony that the petitioner's continued employment at Sealy was "in jeopardy" due to excessive absenteeism. (2T81-17 to 22). In addition, the petitioner said in his confession that he used an extinguisher to put out the fire on January 29, 1980; this corresponds to Mr. Naiman's testimony that when he arrived on the second floor, employees were already using extinguishers. (3T89-6 to 2T72-21). Finally, the petitioner's reference to clean-up procedures was confirmed in the response elicited during the State's direct examination of Mr. Naiman. (3T89-10 to 11; 2T7508 to 9).

In the case at bar, there was also extensive corroborating evidence presented at trial regarding the second arson. Again, the petitioner's confession that he had set a fire on that date at the Sealy factory was supported by independent evidence of a fire at the facility on that date. (3T91-21 to 2T92-7; 2T77-7 to 20; 2T106-8 to 11). The petitioner's identification of the second floor storeroom site of the fire, where the mattress construction materials were kept, agreed with trial testimony in the State's case. (3T92-1 to 11; 3T92-19 to 22; 2T77 to 18). The presence of the petitioner in the building on February 12, 1980 was confirmed by his time card for that date, which showed that he had reported for work at 6:53 a.m , and the alarm came into the fire department at 7:03 a.m. (2T80-3 to 6; 2T110-12 to 13). The time card also indicates that the petitioner was on the premises until 9:40 a.m., at which time he "punched out." (2T96-23 to 24).

In his confession the petitioner said that upon arriving at the factory on February 12, 1980, he punched in and then proceeded to the third floor, remaining only long enough to inquire if mattress assembly materials had to be transported there; he then stated that he went downstairs to the storeroom area. (3T91-25 to 3T92-11). This recitation of petitoner's actions immediately prior to his setting the second fire is in complete conformity with his normal routine of work-related duties as established by Mr. Naiman's testimony. (2T80-13 to 17). The fact of petitioner's access to the arson site on the second floor, which area he accurately described in terms of the physical layout of the plant, was also corroborated by Mr. Naiman's trial testimony. (3T92-1 to 11; 2T80-13 to 17).

Furthermore, the petitioner's general description of "mats" as the materials which ignited during the second fire is supported by the

fact that hog and horse hair pads used in mattress construction actually burned in the fire on February 12, 1980. (3T92-19 to 20; 3T94-2 to 5; 2T77-21 to 23; 2T78-8 to 14). The manner in which the petitioner described starting the second fire is also in accord with the evidence adduced in the State's case regarding the fact that the fire was deliberately set and ignition probably resulted from the mats being exposed to an open flame. (3T91-25 to 3T92-22; 2T107-11 to 2T108-9). Finally, the minimal nature of the losses caused by the second fire, which fact was adverted to in petitioner's statement, was borne out by the State's proofs. (3T94-9 to 11; 2T78-21 to 2T79-7).

In the instant case, the petitioner essentially argues that sufficient proofs must exist to convict him independent of the confession itself. By this rationale the State would be required to present independent corroborating proof of such a magnitude as would exclude any other possible defendant; this reasoning, if pursued to its logical endpoint, renders any confession superfluous. Respondent submits that adopting the standard urged by petitioner, which, clearly, is not that set forth by this Court, would create an unwarranted burden of proof clearly contrary to established law. In the present case, the issue considered by the state courts was whether the facts adduced at trial comported with the formula articulated in *State v. Lucas, supra.* (Such test, as discussed herein, is entirely consistent with federal constitutional law regarding corroboration of confessions.) Since there can be no reasonable argument but that the federal and state formulations are the same, the only issue presented to this Court is the purely factual determination of whether the evidence below was sufficient to comply with this standard. Both the trial court and the New Jersey Supreme Court held that it was. No factor in this sequence suggests the propriety of review by this Court. Grant of the writ of certiorari is not justified merely to afford this petitioner yet another opportunity to question the factual findings made by the trial court and affirmed by the New Jersey Supreme Court.

CONCLUSION

It is respectfully submitted that the petitioner has wholly failed to sustain his burden of establishing under *Sup. Ct. R. 17* that there are special and important reasons why the writ should be granted. In the present case, the New Jersey Supreme Court has neither decided an important question of federal law which has not been, but should be, settled by this Court, nor has it decided a federal question in a way in conflict with an applicable decision of this Court. For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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